



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 44

[Docket ID: DOD-2020-OS-0041]

RIN 0790-AL00

Screening the Ready Reserve

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: As part of the continuing response to coronavirus disease 2019 (COVID-19), DoD has revised the Code of Federal Regulations (CFR) to aid civilian employers in more quickly identifying key employees so the Department can better understand the capacity and capability available to support the response to the current pandemic and to avoid military-civilian manpower conflicts in future Declarations of National Emergency or in military mobilizations.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: CAPT Richard Howell, (703) 697-3837.

SUPPLEMENTARY INFORMATION: DoD's internal policy, DoD Directive 1200.07, "Screening the Ready Reserve" (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/120007p.pdf>) establishes requirements for Federal Government employers and the rule parallels those requirements for application to non-Federal employers, *i.e.*, all employers not of the Federal Government (State, local, non-profit, private, self-employed, etc.), hereafter referred to as "employer."

Legal Authority

Title 10 U.S.C. 12302 authorizes the President to recall up to 1 million reservists for up to 2

years in times of national emergency. Title 10 U.S.C. 10149, “Ready Reserve: continuous screening” requires the Secretary to provide a system of continuous screening of units and members of the Ready Reserve to ensure:

- (1) no significant attrition of those members or units during a mobilization.
- (2) a proper balance of military skills.
- (3) those with military skills for which there is an overriding requirement, members having critical civilian skills are not retained in numbers beyond the need for those skills.
- (4) recognition will be given to participation in combat and national security and military requirements.
- (5) members whose mobilization in an emergency would result in an extreme personal or community hardship are not retained in the Ready Reserve.

Background

The Ready Reserve is the category of reservists most often called to active duty. It consists of three subcategories: Selected Reserve, Individual Ready Reserve (IRR), and Inactive National Guard.

The Selected Reserve are the first to be activated. Most reservists are in this category.

The IRR is made up mainly of those who have had training and served in an Active Component.

The Inactive National Guard are those who leave active drilling status in the Army National Guard before completing their enlistment and will be put in this category unless they specifically request a transfer to the IRR. Only the Army maintains an Inactive National Guard.

If a reservist is unable to meet the requirements to be recalled, the respective Military Service shall discharge, retire, or transfer the member to the Standby Reserve. The Standby Reserve are reservists who maintain their military affiliation but are not members of the Ready Reserve. This may include reservists who fill key Federal positions as well as members whose civilian employers designate their job as crucial to national security.

Title 10 U.S.C. 12302 also states recall consideration will be given to:

- (1) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;
- (2) family responsibilities; and
- (3) employment necessary to maintain the national health, safety, or interest.

For example, if a health care professional can do society more good as a civilian, that individual may be exempted from recall. If reservists have serious family responsibilities, they may be exempted. The law may also exempt veterans with some disabilities, medical conditions, or certain separation codes from any involuntary recall.

On March 27, 2020, Executive Order 13912, *National Emergency Authority To Order the Selected Reserve and Certain Members of the Individual Ready Reserve of the Armed Forces to Active Duty* (available at <https://www.federalregister.gov/documents/2020/04/01/2020-06985/national-emergency-authority-to-order-the-selected-reserve-and-certain-members-of-the-individual>) was issued. While other authorizations are available for recall of the Ready Reserve, this Executive order was required to allow the Secretary of Defense the maximum flexibility for this national emergency to call up Ready Reserve members to help in the country's response to COVID-19. On April 2, 2020, the Secretary of Defense issued *Guidance on Activating the National Guard, Reserve, and Individual Ready Reserve for Coronavirus Disease Response* (available at <https://prhome.defense.gov/Portals/52/Guidance%20on%20Activating%20the%20National%20Guard%20Reserve%20and%20IRR%20for%20COVID-19%20OSD003539-20%20RES%20Final%201.pdf>) describing how the Military Services can activate the National Guard and the Ready Reserve to support the domestic response to COVID-19.

Expected Impact of the Changes Finalized by this Rule

DoD's revisions support military mobilization without diminishing the civilian national coronavirus response. The rule is meant to enhance civilian employer awareness of the need to

provide early identification of critical civilian positions within their organizations and, in coordination with the Military Services, allow the Service member to be considered for service not as a Ready Reserve member who is factored into military mobilization planning.

This rule only discusses employee and employer actions before a mobilization. After a mobilization is ordered, no deferment, delay, or exemption from mobilization will be granted because of civilian employment. The Uniformed Services Employment and Reemployment Rights Act (USERRA), 1994, Public Law 103-353, as amended at 38 U.S.C. 4301-4335, affords reservists and employers various rights and responsibilities regarding reemployment of their civilian position. Employers must ensure key position determinations are not undertaken in a manner that would violate USERRA, its implementing regulations at 20 CFR part 1002, or other Federal statutes and regulations.

Civilian employers, usually through their onboarding programs, identify key employees to ensure the Military Services have an accurate assessment of Ready Reserve members. This assessment of employees who have a Ready Reserve affiliation is meant to preclude conflicts between a member's mobilization requirements and non-Federal civilian employment obligations during times of war or national emergency. Ready Reserve members with critical civilian skills should work with their employer before mobilization. The efforts of civilian employers and their employees pre-mobilization will help identify employees who are required for the ongoing civilian response to the pandemic. While Ready Reserve members are already required to be screened by their respective Military Service per 10 U.S.C. 10149 and to work with their employer to ensure those with critical civilian skills are identified, these updates to the CFR will ensure a more accurate accounting of capability and capacity of the specialties required for COVID-19 response.

This rule updates the naming of current offices within the Office of the Secretary of Defense (OSD), provides current information on service points of contact, and removes previous language pertaining to Federal Government employers to more succinctly clarify employer

responsibilities to petition the respective Military Service of Ready Reserve members that may have a conflict with their employment prior to a military mobilization. These changes highlight how a civilian employer, based on their capability and capacity during either normal or extenuating circumstances such as the ongoing COVID-19 response, petitions a Military Service on behalf of a Ready Reserve employee who occupies a key position within a company or occupies a position where military mobilization would create an extreme personal or community hardship. Employers are encouraged to assess the internal capabilities of their own positions and the organic capacity to sustain emergency manpower needs prior to a military mobilization which can produce an accurate listing of what they consider key positions to their organization.

Comments and Responses

On Monday, December 28, 2020 (85 FR 84237-84243), the DoD published an interim final rule titled “Screening the Ready Reserve” for a 60-day public comment period. No public comments were received and this rule is being finalized with no changes from the published in interim final rule.

Regulatory Analysis

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The final rule is not a significant regulatory action under Executive Order 12866 and has not been reviewed by the Office of Management and Budget.

Costs

DoD believes the economic impact to civilian employers is minimal, estimating a

cumulative total of \$11K across all employers nationwide. Employers are already required to identify employees who are Ready Reserve members. The cost to employers of screening is already imbedded in their HR processes. The estimated costs if an employer submits a petition to a Military Service is calculated below and will vary based on the automation of human resource processes and the number of employees of an organization who are Ready Reserve members with critical skills. Ready Reserve members are already required to be screened by their respective Military Service per 10 U.S.C. 10149 and to work with their employers to address any concerns. The benefit of screening to the employer is to ensure those with critical civilian skills are identified in order to prevent conflicts between the emergency manpower needs of civilian and military activities during a mobilization.

The following describes how the estimated sum total of \$11K was derived using existing costs to project costs of a petition. Using data from the U.S. Bureau of Labor Statistics, U.S. Census, DoD Total Military Strength report, and the DoD Status of Forces survey, less than 0.3 percent of the U.S. population is in the Reserve, including the National Guard, with 51 percent employed by the public [Federal (36 percent), State (9 percent), or Local (6 percent)]. There were 1,020,156 Military Service members in the Ready Reserve as of March 2020 and over 782,000 of those members are estimated to have civilian employment. Approximately 0.3 percent of the 782,000, or 2,346 members, may be identified as key civilian employees and may require a petition. The 2019 median hourly wage for an HR professional or manager is \$34.92 an hour. The cost to screen one employee as part of an onboarding process questionnaire or through an annual recertification process, which is estimated at less than 10 minutes or \$5.82, is already imbedded in their HR processes and thus not included here. The cost to prepare a petition on one employee is estimated at 2 hours, or \$69.84. Applying a more appropriate and realistic planning factor of 0.3 percent to reflect key positions in civilian organizations reflects a projected annual cost, collectively from all employers, of \$11,095.

Cost Benefit Analysis Assumptions and Sources

It should be noted, not every Ready Reserve member in a company would be considered in a “key position” and therefore, a petition would not be needed on every member. The estimated cost presented encompasses all 1,020,156 Ready Reserve members and a 0.3 percent planning factor.

Assumptions in cost calculation include: U.S. population: 329,648,880 (as of May 14, 2020, source: <https://www.census.gov/>); Ready Reserve: 1,020,156 (as of March 31, 2020, source: Total Military Strength report obtained from the Defense Manpower Data Center from each Military Service HR system of record); Percent of U.S. population in the Ready Reserve (Reserve/U.S. population): 0.0030947 or 0.3 percent. Based on these data points, a projected 0.3 percent of employers in the country employ a Ready Reserve member. The Bureau of Labor Statistics at the end of March 2020 reported a U.S. working population of 155,167,000 with 16,294,000 working office/admin (human resources/HR). Applying the projected 0.3 percent of employers with Ready Reserve members (HR*0.3 percent) reflects 48,882 HR employees to address Ready Reserve members for their employer. With a median salary for HR Manager/Specialist of \$34.92/hour, an annual screening is estimated to take 10 min (Rate/6) or \$5.82 and to prepare a petition package to take 2 hours (Rate*2) or \$69.84. Only the petition calculation is include as the annual screening is already imbedded in HR processes.

Data from 2018 DoD Status of Forces Survey reflects the following breakdown of principal civilian employment before most recent activation: Federal Government 36 percent; State government 9 percent; Local government 6 percent; Private/public company 43 percent; Non-profit 3 percent; Self-employed 2 percent; and Family business/farm/unemployed 1 percent. The below table reflects the costs of the 48,882 HR employees who would be preparing petitions on the Ready Reserve members in their organization.

Screening Ready Reserve/National Guard Cost Analysis			
	%	# Employees	2-hr at 0.3% planning factor

Private	49%	23,952	\$5,018.46
Federal	36%	17,598	\$3,687.03
State	9%	4,399	\$921.76
Local	6%	2,933	\$614.51
Grand Total	100%	48,882	\$11,095.24

Cost to the DoD. These estimates (0.3 percent of 782,000 Ready Reserve members fill key positions) indicate the Military Services would adjudicate approximately 2,346 members, a number well within the normal processing by all Military Service Reserve centers and therefore would not add additional costs.

Benefits

Civilian Employer processes and military screening actions ensure civilian employers and the Military Services have the appropriate balance of civilian and military skills required for both parties in case of a mobilization. The challenges faced today in communities as well as in the DoD require dynamic and timely employment of our service members while reducing the conflict of those members to meet both military and or civilian requirements. Ultimately, the response to military mobilization and civilian planning will be greatly enhanced when the essential projected response needs have been equitably calculated for a Ready Reserve member and employee. Military Service annual screening provides a vital Ready Reserve force composed of members who meet Military Service readiness standards of mental, moral, professional, and physical fitness and possess the military qualifications required in the various grades, ratings, and specialties of their Military Service; and are available immediately for active duty during a mobilization or as otherwise required by law. The tasking of a Ready Reserve member who is known to be critical to civilian response in a key position that was not previously adjudicated through the Military Service could create a delay in the civilian response and in turn create potential harm to the local community. The benefit of this rule fosters a partnership in the

appropriate balance of civilian and military assessments to meet needed requirements for a response while not decrementing each other's capacity and capability.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

The DoD certifies that this final rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact creating a substantial cost to a number of small entities. There are a small percentage of defined critical employees in the civilian sector, regardless of the national emergency, that are required to support their civilian employer. As the response to the pandemic evolved, the need for certain specialties in the response evolved. In the case of COVID-19, the immediate need was for medical providers and the situation evolved requiring additional specialties for support. In other non-Federal employment areas, a critical employee may stay consistent, as in the example of a sole nuclear reactor chief within a plant who should not be in the Ready Reserve as he or she would be required to mobilize if called upon and not be able to perform the critical civilian skill. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act"

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires

agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$167 million in 2019 dollars, updated annually for inflation. It is estimated this final rule will not substantially affect State, local, or tribal governments and private sector costs any more than the previous rule requirements.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 44 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates an interim final rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. It is estimated this final rule will not have a substantial effect on State and local governments, where 9 percent and 6 percent respectively employ Ready Reserve, including the National Guard, members.

List of Subjects in 32 CFR Part 44

Armed forces reserves.

PART 44—SCREENING THE READY RESERVE

Accordingly, the interim final rule revising 32 CFR part 44, which published at 85 FR 84237 on December 28, 2020, is adopted as final without change.

Dated: October 26, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer,

Department of Defense.

[FR Doc. 2021-23639 Filed: 10/29/2021 8:45 am; Publication Date: 11/1/2021]